Supreme Court, U.S.
FILED
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No. :

In the

# Supreme Court of the United States

ANN M. DESALVO,

*Petitioner,*

v.

JOACHIM J. VOLHARD, CAROL KAISER, JOSEPH G. MEDICIS, SOCIAL SECURITY ADMINISTRATION, JOANNE B. BARNHART, COMMISSIONER, CAROLYN BURIAN, SSA EEO COUNSEL FOR THE SOCIAL SECURITY ADMINISTRATION, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), CARLTON HADDEN, DIRECTOR, KEVIN J. BERRY, ADMINISTRATIVE JUDGE, EEOC,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI

ANN M. DESALVO
*Petitioner Pro Se*
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pril 2009

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## QUESTIONS PRESENTED

The District Court *sua sponte* found that the Agency had waived "untimeliness" as a defense because there was no indication in the record that the Agency had asserted that defense at the administrative level for discrimination against me when hired. The respondent(s) do not challenge the District Court's Decision in this respect. I was discriminated against from the time I was hired until I was forced to quit. I argued this, yet my petition for rehearing – Summary Order filed February 26, 2009, was denied. I argued my case to Kevin J. Berry, Administrative Judge for the United States EEOC, New York District Office, as well at the U.S. Court of Appeals for the Second Circuit. I also argued abuse of power, controlling of witnesses, controlling issues investigated, controlling investigation, intimidation of witnesses, abuse of power, obstruction of justice, perjury, and tampering with evidence in my case. Also, I was denied my right to a fair and impartial trial by a jury for 11 years and 10 months to date. My Petition for rehearing summarizes the discrimination, harassment, retaliation, humiliation, intimidation and ridicule I suffered. My entire case record contains 11 years and 10 months of argument and proof of the above through witness testimony and documents I submitted over the years.

1) Why did the United States Court of Appeals for the Second District not accept my Petition for rehearing and decide in my favor, awarding me the relief I seek, when I addressed all the issues in the

Summary Order; including the fact that I did challenge the District Court's finding regarding my being discriminated against when hired because of my age, stating that the District Court *sua sponte* found that the Agency had waived "untimeliness" as a defense because there was no indication in the record that the Agency had asserted that defense at the administrative level and the respondent(s) do not challenge the District Court's decision in this respect?

2) Since I submitted documented proof in the total case record that I was qualified for clerk, assistant, paralegal and writer positions up to my previous grade level (GS-11/2) held while working with the office of personnel management as a staffing specialist both competitively and non-competitively, why did the courts not decide in my favor and award me the relief I seek?

3) Why did the United States Court of Appeals for the Second Circuit not accept my petition for rehearing arguing in detail that I did prove in the case file that the work environment was both subjectively and objectively hostile and award me the relief I seek?

4) Why did the United States Court of Appeals not accept my Petition for rehearing in which I argued in detail that I suffered a constructive discharge and award me the relief I seek?

5) Are the judges involved in my case showing partiality because other judges are involved?

6) Will the Supreme Court allow the judges and Agency officials involved in my case to abuse power, control witnesses, obstruct justice, tamper with evidence and allow perjury from judges and government officials?

7) Why was I not allowed a trial by jury so that the public would know of the prejudice prevailing in these Government Agencies towards the older worker and those they consider too religious?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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# IN THE
# SUPREME COURT OF THE UNITED STATES
# PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that Writ of Certiorari issue to review the Judgment below.

## JURISDICTION

( x ) Case from Federal Courts:

The date on which the United States Court of Appeals decided my case was February 26, 2009.

( x ) A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 2, 2009, and a copy of the order denying rehearing appears at Appendix A.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

## STATEMENT OF THE CASE

I established a prima facie case of religion and age discrimination (42a).

1. I, and another older woman, were discriminated against because of our ages when hired. We were hired for part-time and all the other hires (who were younger) were for full time. I do challenge the District Court's finding in this regard. Throughout the record in this case and finally in my brief and appendix to the United States Court of Appeals for the Second Circuit, again, attempted to argue that equitable tolling, waiver and estoppels should be applied to my claim since I was discriminated against upon being hired in 1995 through my last day worked in 1997. The respondent(s) do not deny age discrimination when I was hired. The District Court *sua sponte* found that the Agency had waived "untimeliness" as a defense because there was no indication in the record that the Agency had asserted that defense at the administrative level. The respondents do not challenge the District Court's Decision in this respect.

2. I suffered age discrimination when hired. Carol Kaiser, Joachim J. Volhard and Joseph G. Medicis knew I was qualified for all clerk, assistant, paralegal and writer positions up to my previous grade level held at the United States Office of Personnel Management (OPM). Not only did I explain the federal regulation to them, but my supervisors at OPM did also. This is proven

throughout the entire case record. However, they purposely decided to continue to discriminate against me because of my age and because they thought I was too religious (as they put it). Carol Kaiser put me to work in front of her office window with a vulgar post card of a woman (not in bathing attire as stated in the Summary Order, but with a string between her rear) and she was bending over in a vulgar position. This was in my face – all day, every day (1995-1997). As further harassment, when Joachim J. Volhard and other men in the office came to Carol Kaiser's office (every day from 1995-1997 that I worked at the counter in front of Carol's office), they would stand in the doorway and purposely put their hand on the "fanny" of the girl in the post card as they spoke to Carol Kaiser. After I objected, during my first week of employment, Carol Kaiser (who said she was "queen" and everyone had to court her) got very angry and began retaliation against me immediately; abusing her power by objectively deciding to make my work environment hostile. Carol Kaiser made a decision to make my work environment so hostile I would be forced to quit. My becoming very ill did not deter her from her objective. She incited my co-workers to abuse me as well. It continued daily until I left. She clearly made the decision to discriminate against me because of my age and being too religious (as she put it). She began to control my work environment to the extent of her power to force me to quit. This was with the knowledge of Joachim J. Volhard and Joseph G. Medicis as they worked very closely with Carol Kaiser. They knew what was going on because I spoke to them about the discrimination, harassment,

retaliation, humiliation, intimidation, and ridicule by Carol Kaiser and those she called her "friends". The humiliation, insults, intimidation, ridicule and harassment was daily and constant; as well as tampering with my work to make it appear that I was making mistakes (if I did not catch them at it). I spoke to Joachim J. Volhard as I was told to do and he said that he would speak to Carol Kaiser about the situation. Nothing changed – it only got worse. The entire record proves there was purposely considered retaliation, humiliation, intimidation and ridicule by Joachim J. Volhard, Joseph G. Medicis, Carol Kaiser and her "friends". Carol Kaiser and Joachim J. Volhard told me from the start that I was to come to them for any problems and no one else. Then Carol Kaiser proceeded to constantly assign me to work with her "friends" who harassed me. (For example, my supervisor, Susan Vaeth testified that Carol Kaiser purposely subjected me to work with her "friends"; when as supervisor, she had more time available to train me then they did. Carol Kaiser incited others to harass me so that I would quit (as she constantly suggested). Also, Susan Vaeth testified that Carol Kaiser would use "foul" language, for example the "F" word, in my presence, but not otherwise. In my brief submitted to the court, Mark Wasileski, another witness who was also a supervisor, said: "Anne was a floater and never assigned to a unit during her time at OHA. I do not feel she was ever given the opportunity to move up the line for promotion. She was always being shifted around". He did indicate that I was answering the phones a lot. He felt my work was very good. Since I went to daily mass and was a practicing Catholic,

retaliation, humiliation, harassment and discrimination were a daily occurrence. Another clerk, who was not allowed to testify said that she was incited by Carol Kaiser to harass me and that she was sorry she did. There was an 'open continuous' announcement for clerk, assistant and paralegal positions in the office. Carol Kaiser asked me to apply; so I did. The applications were returned saying they were not accepting applications.

3. The United State Court of Appeals for the Second Circuit Summary Order says I never applied for a paralegal position or decision writer. I did apply for a paralegal position with OHA competitively. Clerk, assistant and paralegal positions were open on a continuous basis and Carol Kaiser asked that I apply. Although I did not have to apply competitively, as proven over and over in the record, I filed applications for all three positions. They were returned saying they were not filling these positions (although they had an open continuous announcement posted in the lunch room). Also, when I found out while on the reception desk that people were applying for decision writer positions, I asked David Neuman to consider me non-competitively since he was conducting the interviews. This is considered applying non-competitively. He never got back to me. I did not apply competitively because the position was not announced at OHA. As Carol Kaiser had told me so many times, if you don't like it – quit. From the time of my first interview with OHA, I asked Carol Kaiser, Joachim J. Volhard and Joseph G. Medicis I be considered non-competitively for full time and higher grade level positions as soon as

possible. Carol Kaiser said they promote very quickly. The record shows that at that time the office of personnel management where I worked previously, was responsible for seeing that Agencies, including SSA and OHA, followed federal regulations in hiring and promoting, and rated applications for SSA and OHA for competitive positions; including clerk, assistant, paralegal and writer. As a matter of fact, I would write rating plans and rate applicants for these positions. The record shows proof that I was qualified both competitively and non-competitively for all clerk, assistant, paralegal and writer positions up to my previous (GS-11/2) grade level. Carol Kaiser, Joachim J. Volhard and Joseph G. Medicis knew this.

4. The United States Court of Appeals for the Second Circuit Summary Order says that I expressly disavowed that my difficulties with the computer instructor were the result of discrimination. The Order is correct that I did not express that my difficulties with the computer instructor were his fault – but, they were the result of Carol Kaiser's discrimination of me. As stated in the record over and over again, and in my reply brief, testimony verifies that Carol Kaiser controlled my training. (Dino Francheschi, the computer instructor, was Carol Kaiser's friend and neighbor, about whom she said "I got him his job here and he owes me plenty". This explains why Carol Kaiser had control over much of his testimony and that he was not always honest). In Sue Vaeth's testimony, she states that as my supervisor she blocked out 2 weeks for my

training with Dino, which he changed. In the addition to my brief, I stated that Dino Francheschi testified "I did not have any personal conflict with Ms. DeSalvo and I thought she was nice to work with". Then he changed his testimony. The record shows changes in his testimony as well as all the respondents. All the training I received was controlled by Carol Kaiser and for several months before I submitted my resignation, I was helping Dino the computer trainer with what he called a new test program that other workers testified they had problems with. It was never mentioned that I needed to complete any other computer training than I was already given. (I was originally scheduled for only 2 weeks of computer training). Carol Kaiser had complete control over the work that I did each day. Her discrimination of me was constant and considered. She let it be known that I either accept the abuse or quit.

5. The United States Court of Appeals for the Second Circuit Summary Order says that the District Court also properly found no evidence that I suffered a constructive discharge. The hostile work environment was so severe that approximately 5 months after starting, I got the shingles so severe all around my chest area that I almost died. When the abuse continued even more severely, I got the shingles again (in my head) before I finally quit. Also, I suffered a hiatal hernia and high blood pressure. I beg the court to decide that the tampering with my work, discrimination, harassment, abuse, intimidation, ridicule and humiliation incited by Carol Kaiser with the

knowledge of Joachim J. Volhard and Joseph G. Medicis was unreasonable and so frequent that they caused me mental anguish that resulted in my near-death illness. The abuse was not simple teasing, off hand comments or isolated incidents of offensive conduct (as stated in the Summary Order). These types of abuses do not cause a life threatening illness such as the shingles I suffered. I really wanted to continue to work there. I needed another 10 years of federal service to get a decent pension. I liked the work until I was told that I would have to cover for a new GS-2 receptionist every day and for all her days off. Meaning – would never advance to a higher pay or full time. Finally, I even asked Carol Kaiser if they would please just give me work to do – but stop the harassment, intimidation, abuse, ridicule and humiliation and just let me work without discrimination. She said no. This is all in the record. The quality and quantity of the work I produced was never an issue while I worked there. Writers asked for me to do work for them because of the quality of my work. One writer, Carol Kaiser's neighbor, even got an award and tried to get one for me because of the work that I did for her. Even the respondent(s) did not testify (although they lied about so much) that the quality of my work was not good. However, all the stress trying to complete the work under such adverse work conditions caused me to get the shingles, hiatal hernia and high blood pressure. Carol Kaiser intentionally made my work conditions so difficult that I was forced to resign. This is totally due to discrimination of me because of my age and being a practicing Catholic. Carol Kaiser got very angry because I complained about the vulgar

postcard in front of my work station all day; deciding that I was too old and too religious to promote to full time of a higher grade position (this was after deciding not to hire me full time because of my age). She then constructed a hostile work environment (a pervasive atmosphere of intimidation, ridicule, insult and humiliation) so that I would quit (as she told me to do so often). Assigning me to work with her "friends", who would ridicule, insult, humiliate and harass me every day in some way. Carol Kaiser would use the "F" word near my work station (witness testimony was that they heard her and were surprised because it was said only when I was present (never when I was not there). Other witnesses testified to her and her "friends", screaming at me so loud that they became embarrassed for me. They would tamper with my work so that if I did not catch them, it would appear that I was making mistakes. The humiliation, intimidation and ridicule I suffered concerning work I completed were in reality mistakes made by writers that I did not correct, by were caught by the judges. I was exposed to the vulgar post card and harassment by Joachim J. Volhard and other men in the office, who would put their hand on the "bare fanny" of the girl in the postcard (during my work from 1995-1997 at the counter in front of Carol Kaiser's office). Daily, when I was leaving the office to go to mass or when I returned, OHA workers, including Carol Kaiser, and workers from other tenants in the building would be outside having a cigarette. Carol would laugh and ridicule me. I was subjected to insult and humiliation. Carol Kaiser purposely incited my co-workers to insult, ridicule

and humiliate me in order to force me to quit. I was not dissatisfied with my work assignments as stated in the Summary Order, but with the harassment and discrimination, humiliation and ridicule. However, I did ask Carol Kaiser if she assigned me to cover for the new receptionist hired (giving me more GS-2 level work) would I ever get promoted? She said if I did not like it, I could quit (as she was constantly saying). As stated above, I got the singles (twice), a hiatal hernia, and high blood pressure, I almost died when the shingles went around my chest.

## ADDITIONAL ARGUMENT

I would like to argue that since the respondent(s) purposely discriminated against me because of my age when I was hired, what would stop them from continuing to discriminate against me during my work there; which they did.

The record in my case is voluminous due to continued efforts by the respondent(s) to conceal pertinent information from being heard and their controlling of the case for over 11 years, 10 months. Testimony in the record and the testimony of witnesses not heard because of the prejudicial control of this case, does not change the facts that I keep arguing over and over. Both Joachim J. Volhard and Joseph G. Medicis knew exactly what Carol Kaiser was doing to me and that she was inciting others to do the same. They made working at OHA intolerable for me and caused me to suffer mental anguish that resulted in my getting a hiatal hernia, high blood pressure and severe shingles; not once, but twice during the short time I worked there. Desperately needing a job and to work for the U.S. Government for another 10 years to get a decent pension, I tried to stay on; begging Carol Kaiser to let me stay and work in peace, even if I did not get promoted. She said no. I was forced to quit. Then, because the investigation was prejudicial and controlled in favor of the respondent(s) I continue to suffer because of discrimination.

## REASONS FOR GRANTING THE PETITION

The investigation, procedures, and decisions in my case have been totally prejudicial on the side of the respondent(s); and so far departed from the accepted usual course of judicial proceedings that it results in the denial of my rights and sanctions such a departure by the lower courts as to call for an exercise of this court's supervisory power. The public does not know of the prejudice prevailing in these Government Agencies and that the Social Security Administration and the Office of Hearing and Appeals have been allowed to discriminate against older workers and workers they consider too religious because they are practicing Catholics, going to daily mass.

The United States Court of Appeals for the Second Circuit by denying me Petition for rehearing and not finding that the Social Security Administration and the Office of Hearings and Appeals discriminated against me at the time of my hiring, did not consider that the District Court *sua sponte* found that the Agency had waived "untimeliness" as a defense because there was no indication in the record that the Agency has asserted that defense at the administrative level (the respondents do not challenge the District Court's Decision in this respect). Since I challenge the District Court's Decision in this regard and the record proves that I and another older woman were discriminated against by the Office of Hearings and Appeals by hiring us for part time, while all the younger women were hired for full time, the decision by the courts in my case were erroneous as shown in

my statement of the case. For example, in the Summary Order by the U.S. Court of Appeals for the Second Circuit, they state that "Attorneys and paralegals were hired as decision writers during DeSalvo's employment, and she did not have these certifications. Even if these qualifications were unnecessary DeSalvo never applied for this position". I argued throughout my case file and to the U.S. Court of Appeals for the Second Circuit that I did indeed apply for a paralegal position with OHA competitively. Clerk, assistant and paralegal positions were open on a continuous basis and Carol Kaiser asked that I apply. Although I did not have to apply competitively, as proven over and over in the record, I filed applications for all three positions. They were returned saying there were not filling these positions (although they had an open continuous announcement posted in the lunch room and Carol Kaiser asked me to apply). The record clearly proves that I qualify for all clerk, assistant, paralegal and writer positions up to my previous grade level (GS-11/2) based upon my experience with the Office of Personnel Management, with documentation submitted several times and statements by two Office of Personnel Management supervisors and copies of the Union Agreement with the Office of Hearings and Appeals regarding these issues. In my Petition for rehearing with the U.S. Court of Appeals for the Second Circuit, I argued against every point that they made in their Summary Order. The statement of my case reflects points my made in my Petition for rehearing.

The public has a right to know what these Agencies and Government Officials are guilty of and

what others, similarly situated have to contend with working in the United States civil service environment. The public has a right to know that some judges and agency officials think themselves above the law. After being made very ill, I found that no honorable lawyer would take my case against the federal government system and that the respondent(s) expected me to quit fighting my case, just as they finally got me so ill that I had to quit my job with OHA. They consider themselves above the law. To date, justice does not prevail in the United States court system when it allows judges and agency officials to abuse their power, control witnesses, control investigations, intimidate witnesses, obstruct justice, perjure themselves and tamper with evidence (my case file contains proof through evidence submitted and witness testimony). It appears that my case was controlled and delayed for over 11 years and 10 months to date in the hopes I would finally give up or die as some of my witnesses have.

I pray that the Supreme Court will truly judge my *pro se* case justly and prove that the United States court system will protect the innocent from discrimination and abuse by federal agency officials and judges.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: April 27, 2009

Respectfully submitted,

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Ann M. DeSalvo

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE**

**DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of February, two thousand and nine.

Present: ROSEMARY S. POOLER,
DEBRA ANN LIVINGSTON,
Circuit Judges,
JED S. RAKOFF,*
District Judge.

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ANN M. DESALVO,
Plaintiff-Appellant,

-v- (07-4403-cv)

JOACHIN J. VOLHARD, CAROL KAISER, KEVIN J. BERRY, DAVID NEUMAN, MARY JOAN MALESKI, JEAN SULLIVAN REED,
Defendants-Appellees.

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* The Honorable Jed S. Rakoff, United States District Judge of the United States District Court for the Southern District of New York, sitting by designation.

LOUISE GALVIN,

Defendant,

ROXANA PONTIUS, SOCIAL SECURITY ADMINISTRATION, JOANNE B. BARNHART, COMMISSIONER, JOSEPH G. MEDICIS, CAROLYN BURIAN, SSA EEO COUNSEL FOR THE SOCIAL SECURITY ADMINISTRATION, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CARLTON M. HADDEN, DIRECTOR,

Defendants-Appellees.

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Appearing for Plaintiff-Appellant: Ann M. DeSalvo, pro se.

Appearing for Defendants-Appellees: Paula Ryan Assistant United States Attorney, for Andrew T. Baxter, Acting United States Attorney for the Northern District of New York, Syracuse, NY.

Appeal from the United States District Court for the Northern District of New York (Mordue, C.J.).

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Plaintiff-appellant Ann M. DeSalvo appeals an order and judgment of the United States District Court for the Northern District of New York (Mordue, C.J.), entered on September 27, 2007, granting defendant-appellee Social Security Administration's ("SSA") motion for summary judgment and dismissing her claims alleging a failure to promote, hostile work environment, and constructive discharge based on her age and religion. We assume the parties' familiarity with the facts, the proceedings below, and the issues on appeal. DeSalvo made a motion to file a reply brief out of time at oral argument on this appeal. We grant the motion and consider DeSalvo's reply brief here.

"We review a district court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." Allianz Ins. Co. v. Lerner, 416 F.3d 109, 113 (2d Cir. 2005). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

We review claims of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and of religious discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., using the burden-shifting framework established in McDonnell

Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Fisher v. Vassar Coll., 70 F.3d 1420, 1449 (2d Cir. 1995) (ADEA claims); Meiri v. Dacon, 759 F.2d 989, 994-95 (2d Cir. 1985) (Title VII claim of religious discrimination). A plaintiff's establishment of a prima facie case of discrimination shifts the burden to the defendant to offer a legitimate, non-discriminatory reason for its actions. Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003). The burden then returns to the plaintiff who must show that the adverse employment decision "was more likely than not motivated, in whole or in part," by discriminatory reasons. Howley v. Town of Stratford, 217 F.3d 141, 150 (2d Cir. 2000).

Assuming DeSalvo established a prima facie case of age discrimination, we agree with the district court that the SSA offered legitimate, non-discriminatory reasons - a lack of qualification and failure to apply for promotions - that account for why DeSalvo was not promoted. DeSalvo has not offered sufficient evidence to raise a genuine issue of material fact with respect to whether discrimination was more likely the reason for the absence of a promotion than her qualifications and failure to apply. See Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000). She did not complete the computer training needed to qualify for the one promotion she did apply for. She expressly disavowed that her difficulties with the computer instructor were the result of discrimination. As for the decision writer position, the record supports the SSA's explanation that DeSalvo was not qualified for

this position. Attorneys and paralegals were hired as decision writers during DeSalvo's employment, and she did not have these certifications. Even if these qualifications were unnecessary, DeSalvo never applied for this position. DeSalvo has not challenged the district court's finding that any claim related to her initial hire as a part-time employee was untimely. See LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995) (arguments not raised on appeal are ordinarily waived). DeSalvo also does not demonstrate a genuine issue of material fact as to whether her religion, rather than the SSA's proferred reasons, explain why she was not promoted.

A hostile work environment claim requires proof that the work environment was both subjectively and objectively hostile. To show the latter, "a plaintiff must produce evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (quotation marks omitted), see also Quinn v. Green Tree Credit Corp., 159 F.3d 759, 767-68 (2d Cir. 1998) (explaining the "variety of factors" that inform the hostile work environment inquiry including "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance'" (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21

(1993))).

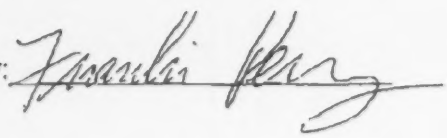
The district court accurately observed that the record does not support an inference that the SSA created a discriminatory hostile work environment for DeSalvo. We do not doubt that the postcard of a woman in bathing attire subjectively offended DeSalvo. But a single picture of this kind could not rationally be found to create "a pervasive atmosphere of 'intimidation, ridicule and insult.'" Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 319 (2d Cir. 1999) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)) (finding several nude pictures insufficient to create an objectively hostile work environment). Many of the alleged insults by co-workers concerned work-related issues and did not concern DeSalvo's age or religion. While the record indicates at least one occasion when co-workers referred to DeSalvo as "goody-goody" and "the holy-holy" in her presence, these isolated comments do not show an objectively hostile work environment. See Petrosino v. Bell Atl., 385 F.3d 210, 223 (2d Cir. 2004) ("Simple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment.")

The district court also properly found no evidence that DeSalvo suffered a constructive discharge. A constructive discharge claim lies when an employer makes working conditions so difficult that a reasonable person would feel compelled to resign. See Kirsch v. Fleet Street, Ltd., 148 F.3d

149, 161 (2d Cir. 1998). DeSalvo's dissatisfaction with work assignments and the episodes when co-workers shouted at her do not support her constructive discharge theory.

For the foregoing reasons, DeSalvo's motion to file a reply brief out of time is **GRANTED**. The judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: 

**UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ANN M. DESALVO,

Plaintiff, CIVIL JUDGMENT
5:02-CV-1148
-v- (NAM)(GJD)

SOCIAL SECURITY ADMINISTRATION; JOANNE B. BARNHART, COMMISSIONER; EQUAL OPPORTUNITY EMPLOYMENT COMMISSION; CARLTON HADDEN, DIRECTOR; JOSEPH G. MEDICIS; JOACHIM J. VOLHARD; CAROL KAISER; KEVIN J. BERRY; DAVID NEUMANN; MARY JOAN MELESKI; JILL SULLIVAN REED; ROXANA PONTIUS; CAROLYN BURIAN,

Defendants.

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**DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant's motion for summary judgment is granted, and the complaint is dismissed in its entirety.

September 27, 2007
Date

LAWRENCE K. BAERMAN
Clerk

s/
Judi L. Roberts
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ANN M. DESALVO,
Plaintiff,

-v- 5:02-CV-1148 (NAM)(GJD)

SOCIAL SECURITY ADMINISTRATION; JOANNE B. BARNHART, COMMISSIONER; EQUAL OPPORTUNITY EMPLOYMENT COMMISSION; CARLTON HADDEN, DIRECTOR; JOSEPH G. MEDICIS; JOACHIM J. VOLHARD; CAROL KAISER; KEVIN J. BERRY; DAVID NEUMANN; MARY JOAN MELESKI; JILL SULLIVAN REED; ROXANA PONTIUS; CAROLYN BURIAN,
Defendants.

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APPEARANCES: OF COUNSEL:

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*Plaintiff Pro Se*

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United States Attorney — Assistant U.S. Attorney
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Syracuse, New York 13261-7198
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**Norman A. Mordue, Chief U.S. District Judge:**

## MEMORANDUM-DECISION AND ORDER

## I. INTRODUCTION

In a *pro se* amended complaint filed on October 9, 2002, plaintiff Ann M. DeSalvo alleged that she suffered employment discrimination while working for the United States Social Security Administration ("SSA") between September 1995 and May 1997. Specifically, plaintiff alleges that she was discriminated against on the basis of her age when the SSA's Office of Hearings and Appeals ("OHA") hired her in a part-time capacity while offering full-time employment to two younger women. As a further matter, plaintiff alleges that her age was a factor in OHA's decision to hire only lawyers for various "writer" positions which became available during her employment with SSA. Plaintiff avers that she suffered "religious discrimination" as well by way of being forced to work in an area where a co-worker left a "vulgar postcard" in plaintiff's "line of vision." Finally, plaintiff asserts that she was the victim of tort-like conduct by her superiors and co-workers such as harassment, interference with her work and abuse of power – all resulting in denial of justice and freedom to work without abuse.

After pursuing her administrative remedies with SSA which resulted in an agency investigation and evidentiary hearing before the Equal Employment Opportunity Commission ("EEOC") in November 2000, EEOC issued a determination that plaintiff had failed to meet her burden of proving age or religious discrimination. Plaintiff appealed the

ALJ's determination to EEOC which affirmed the decision in August 2002. Plaintiff then commenced the present action in September 2002, suing SSA under 42 U.S.C. § 1983[1] along with various officials and employees of the SSA including two administrative law judges ("ALJ's"). Plaintiff also named EEOC as a defendant along with the ALJ who rendered the unfavorable determination concerning her claims of employment discrimination. This court previously granted the government's motion to dismiss all defendants, save SSA, from the action. Presently before the Court is a motion by the sole remaining defendant SSA for summary judgment.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The Court has reviewed the entire administrative record which includes SSA's Report of Investigation ("ROI") consisting of evidence gathered in the course of defendant's own

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[1] Plaintiff did not assert New York State law as the basis for any of her claims nor did she actually state the statutory basis for federal court jurisdiction in the amended complaint. Rather, she presented her claims for filing on the *pro se* complaint form available through the Clerk's office. This form is commonly used by inmate litigants who assert claims relating to conditions of confinement under 42 U.S.C. § 1983. In its previous Memorandum-Decision and Order in this case, the Court presumed plaintiff intended to sue under the federal statutes which proscribe unlawful employment discrimination, e.g. Title VII codified at 42 U.S.C. § 2000e and the Age Discrimination in Employment Act ("ADEA") set for in 29 U.S.C. § 621 *et seq.*, rather than 42 U.S.C. § 1983 since none of the named defendants were state actors.

examination of plaintiff's claims. The ROI includes sworn affidavits from plaintiff and various witnesses. The record also contains a transcript of the EEOC hearing concerning plaintiff's complaints which occurred in November 2000. The hearing transcript reflects the testimony of the plaintiff and 14 additional witnesses. Further, the Court has reviewed plaintiff's deposition testimony from August 2005 and various affidavits and documents submitted by the parties. Based upon review of the record, the following facts have emerged:

Plaintiff Ann DeSalvo was born on August 12, 1941. From 1983 to 1995, plaintiff was employed with by the United States Office of Personnel Management ("OPM") in Syracuse, New York. Plaintiff's final position with OPM was as a personnel staffing specialist at Grade GS-11, Step 2. In September 1995, the Syracuse OPM office was closed and its entire staff of over 40 people were subjected to a "reduction in force" ("RIF").

Having been advised of the planned RIF, plaintiff applied for a position with SSA's Syracuse OHA. Plaintiff was one of a number of RIF'd OPM employees interviewed for various full-time and part-time positions by Carol Kaiser, the manager of the Syracuse OHA, and by the Acting Hearing Office Chief, Administrative Law Judge Joachim J. Volhard. During her interview, Ms. Kaiser and ALJ Volhard informed plaintiff that the only positions available in the Syracuse OHA were entry-level (GS-4) positions. However, ALJ Volhard and Ms. Kaiser told plaintiff that the possibility for future promotions existed, depending upon her performance

at OHA.

ALJ Volhard averred that he was reluctant to offer plaintiff an entry-level position at OHA because of her significantly higher grade level and work responsibilities at OPM. Ms. Kaiser also averred that she was concerned about the prospect of spending six months training an employee with plaintiff's prior experience, only to have such an employee quit for lack of satisfaction with his or her grade-level. In response to their expressed concerns about hiring her, plaintiff assured Ms. Kaiser and ALJ Volhard that her primary objective was to avoid a break in federal service, and that she understood that training would be required for her to learn her new agency's programs. Thereafter, Ms. Kaiser offered plaintiff a position as a part-time GS-4 Office Automation Clerk. Plaintiff began her employment with OHA effective September 17, 1995.

Along with plaintiff, three other OPM employees who had been "RIF'd" obtained employment at the Syracuse OHA. Two of these hires were hired for full-time positions at the GS-4 pay rate. Plaintiff and the fourth new hire (Martha Glessing) were offered and accepted part-time employment with the Syracuse OHA which allowed them to work 32 hours per week. In addition, two other displaced OPM employees were offered full-time GS-4 positions with the Syracuse OHA, but declined the offers.

Prior to making these various offers of employment, Ms. Kaiser ranked the applicants based on information in their applications, prior work experience and their references. Kaiser also

asked the acting director of the Syracuse OPM for input on each applicant. Ms. Kaiser recalled that plaintiff's recommendation from her previous employer was "not bad, but simply not as good" as his comments about the other displaced OPM workers who were offered full-time OHA positions. The other OPM employee who was offered a part-time position did not receive a strong reference from OPM, but the acting director asked Kaiser to hire Ms. Glessing since she had only one year to work before obtaining her eligibility for a pension.

Plaintiff's position, Office Automation Clerk, required her to receive computer training on OHA's network and operating systems as well as the word processing and database entry programs used by the office. Graduated positions within the office required more extensive computer training. Dino Franceschi was the Regional Systems Administrator for the Syracuse OHA. Franceschi testified that plaintiff was often absent from scheduled training sessions, she disrupted training, disagreed with established programs and procedures, had difficulty learning the most basic aspects of data entry, and sometimes cried while training was being conducted. Franceschi thought plaintiff believed that the computer training was beneath her given her prior elevated grade level. Plaintiff, on the other hand, contends that Franceschi himself cancelled computer training sessions and often yelled at and humiliated her during training.

The administrative record also contains evidence that plaintiff was "resistant" to training or had difficulty in other aspects of her job. For

example, plaintiff was assigned to train with Jill Sullivan on how to prepare agency mailings. During the administrative investigation of this matter, Ms. Sullivan averred that plaintiff was absent for scheduled training sessions, failed to follow up with on training and opted to ask fellow employees rather than Ms. Sullivan about procedures. Ms. Sullivan also had the impression that plaintiff felt that her assigned duties were degrading. Plaintiff once told Ms. Sullivan that in her "old job," she had a secretary who did such tasks. For her part, plaintiff contends that Ms. Sullivan was sarcastic to her, harassed her in front of others, yelled, screamed and belittled her work.

For the first four months of her employment with OHA, plaintiff's workstation was a table against the wall outside Carol Kaiser's office. Office personnel had used the table for file storage. When plaintiff cleared the files from the table, a postcard taped to the window just next to the door to Carol Kaiser's office (to the left of plaintiff's line of sight) became visible. The postcard depicted females on a beach in thong bikini bottoms bending over, making their partially exposed buttocks the focal point of the postcard. As a devout Catholic, plaintiff was offended by the postcard which she perceived as "vulgar" or "a form of pornography." Plaintiff averred that she told Carol Kaiser that she was offended by the postcard and Ms. Kaiser stated that she was not going to take it down.

In December 1995, plaintiff's work location was changed to another floor in the office where she remained for about a year. In late 1996 or early

1997, plaintiff was relocated back to the table in front of Carol Kaiser's office and she noticed that the post card was still there. When plaintiff said "This post card is still here," to Carol Kaiser's secretary, Louise Galvin, she stated that Ms. Galvin removed the post card. Ms. Kaiser did not recall plaintiff raising an objection to the post card until she to Ms. Galvin about it approximately one year after coming to work at OHA. Ms. Kaiser testified that once plaintiff objected to the postcard, Ms. Galvin took it right down.

Plaintiff asserts that she was continually subjected to discrimination and harassment based on her religion. During plaintiff's employment at OHA, fellow employees sometimes watched television programs in the office "break" room that plaintiff found offensive. In plaintiff's presence, two of those employees, Jill Sullivan and Mary Jo Maleski, sometimes made remarks to the effect that they were aware that "some people" might not like the program choice; plaintiff felt those remarks were directed at her. In December 1995, plaintiff started attending noon mass at a church within walking distance of the Syracuse OHA. On "a few" occasions between December 1995 and Spring 1996, when plaintiff was traveling to or from church, she forgot to remove the black lace cap she wore to the services. Plaintiff testified that Ms. Sullivan and Ms. Maleski, "laughed" or "giggled" when they saw her wearing the cap. Plaintiff also testified that on a few occasions, Carol Kaiser referred to her as "Ms. Holy-holy" or "goody-two-shoes" or "goody-goody" while outside of the office but in the presence of other

Syracuse OHA employees. The record reveals that some OHA staff were "on their guard" in plaintiff's presence because of her outwardly religious beliefs and were concerned that plaintiff might find certain comments offensive.

At the time of plaintiff's interview for the Office Automation Clerk position, Judge Volhard and Carol Kaiser had discussed advancement opportunities that did not require additional outside education. While Ms. Kaiser was responsible for posting the advertisements for graduated positions, the SSA Regional Personnel Office processed these applications. When vacancies for various positions arose, announcements posted in the break room instructed employees on where to submit applications. Hearing Office Clerk and Legal Assistant positions were open continuously throughout plaintiff's time at the Syracuse OHA. Plaintiff did apply for a Hearing Office Clerk position on October 12, 1995, approximately one month after she began working at the Syracuse OHA, but she did not apply for any other promotions or advancements. During the course of her OHA employment, plaintiff's name never appeared on any "well-qualified" list of applicants for any graduated position, but she assumed she would be promoted non-competitively based on her previous work experience with OPM and civil service promotion policies. Plaintiff assumes that since she told Ms. Kaiser and Judge Volhard during her initial interview that she would like to work full-time and she told various people within the agency that she would like to work as a decision writer and thought

she was qualified for this position, that she would be promoted.

The record reveals that OHA policy required decision writers to be either "attorney-advisors" or "paralegal specialists." An "Attorney-Advisor" required the applicant be "a member of [a] Bar, in good standing." And while a paralegal specialist "decision writer" did not have to be an attorney, he or she was required to be an experienced agency employee who had extensive experience with and knowledge of SSA's programs. Although plaintiff had not attended law school or even college, had not worked as a paralegal and had no experience drafting agency decisions, she believed she was qualified for a non-competitive promotion to a decision writer position. During plaintiff's time employment with OHA, three "decision writer" positions were filled. One of these positions was a "paralegal specialist" position, and the other two were "attorney-advisor" positions.

Linda Hendricks, who had previously been a legal assistant, was promoted to the paralegal decision writer position on or about plaintiff's first day of employment in September 1995. Hendricks' prior position involved extensive preparation of files, reviewing evidence, and writing portions of decisions, as well as knowledge of SSA's disability programs, administrative hearings and exposure to Medicare cases.

On April 24, 1997, all Hearing Office Clerks, Legal Assistants, and Office Automation Clerks received a schedule prepared by Yvonne Kent for coverage of the office front desk phone duties for the

month of May. Plaintiff noted that her name appeared on the schedule five times for the month, whereas others on the list were on phone duty only two or three times. Plaintiff believed that she had been assigned excessive phone duties in comparison to the rest of the employee pool. Based thereupon, she resigned on April 29, 1997, by placing a handwritten note which said "I quit" in Kaiser's in-box while Kaiser was on the telephone. After talking with ALJ Volhard, plaintiff later changed her mind about resigning, but she did not inform Ms. Kaiser of her change of heart. Thus, on May 13, 1997, when Carol Kaiser arrived at the office for the first time after plaintiff had returned to work, Kaiser was surprised to see plaintiff. Indeed, after plaintiff resigned on April 29, Kaiser had hired a part-time receptionist. When Kaiser met with plaintiff on May 13, 1997, plaintiff told her not only had she decided not to quit, but that she would like to change her day off from Thursdays, as has been scheduled prior to her "resignation," to Fridays. However, since Kaiser had already told the new part-time receptionist that she could have Fridays off, Kaiser told plaintiff she would have to choose a day between Monday and Thursday as her day off. During their meeting on May 13, 1997, Ms. Kaiser also discussed with plaintiff what was expected of her in performing her job. In response, plaintiff expressed her opinion that she was qualified for a "decision-writer" position in accordance with civil service promotion policies. Ms. Kaiser disagreed with plaintiff, but told her to submit her application and see how the Regional Personnel Office would rank her qualifications.

Plaintiff again resigned from the Syracuse OHA on that same day.

Plaintiff complained to her union on May 30, 1997 about perceived mistreatment by OHA and contacted an EEO counselor to complain about employment discrimination on June 5, 1997. SSA investigated plaintiff's claims and issued a report of investigation in May 1998. Plaintiff requested a hearing which was conducted by the EEOC on November 8, 2000. EEOC issued a decision which found no basis for plaintiff's claims of religious or age discrimination on February 3, 2001. There is no evidence in the record concerning any appeals filed by the parties to the EEOC determination.

## III. DISCUSSION

### A. Applicable Legal Standard

A party moving for summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a court, viewing the evidence in the light most favorable to the nonmovant and drawing all reasonable inferences in her favor, determines that the movant has satisfied this burden, the burden then shifts to the nonmovant to adduce evidence establishing the existence of a disputed issue of material fact requiring a trial. *See Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir.1989). If the nonmovant fails to carry this burden, summary

judgment is appropriate. *See Celotex*, 477 U.S. at 323.

Courts have acknowledged the dangers of summary judgment in discrimination cases. "Because direct evidence of ... discriminatory intent will rarely be found, 'affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (quoting *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224 (2d Cir. 1994)). A plaintiff must, however, provide more than conclusory allegations of discrimination to defeat a motion for summary judgment. *Schwapp*, 118 F.3d at 110.

B. Exhaustion of Administrative Remedies

The government contends that plaintiff failed to preserve most of her claims by failing to invoke the administrative process required of federal employees prior to suing for employment discrimination. Plaintiff alleges that she complained to her union about the conduct referenced in the amended complaint on May 30, 1997 and first met with an EEO counselor on July 25, 1997.

An employee suing the federal government for employment discrimination must exhaust certain administrative remedies before initiating a lawsuit in federal court. *Boos v. Runyon*, 201 F.3d 178, 181 (2d Cir. 2000). The first step is to "initiate contact with a[n][EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R.

§ 1614.105(a)(1); *See Boos*, 201 F.3d at 181. According to defendant, invocation of the 45-day rule based even on the earlier of these two dates would preclude the bulk of plaintiff's claims which are based on events, instances and conduct which occurred in 1995 and 1996.

Previously, in opposition to defendant's motion to dismiss her complaint, plaintiff asserted vaguely the "continuing violation" theory which would toll the time period for complaining about the various acts of alleged discrimination perpetuated by defendant. Given the assumptions afforded to litigants opposing a motion under Fed. R. Civ. P. 12(b)(6), together with plaintiff's *pro se* status and the absence of any discovery concerning this issue, the Court denied defendant's motion to dismiss plaintiff's discrimination on the ground of untimeliness. In her present opposition papers, plaintiff seems to have abandoned her claim of a "continuing violation" on the part of defendant. Moreover, she has not presented evidence of a "specific discriminatory" policy or mechanism by defendant which contributed to ongoing unlawful employment practices. *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993). In the absence of proof that defendant permitted "specific and related" incidents of discrimination to continue unremedied for so long as to amount to a discriminatory policy or practice, the continuing violation doctrine is not applicable in any event. *See Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 712 (2d Cir. 1996); *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994).

Nevertheless, for reasons not cited by either party, defendant is not entitled to dismissal of plaintiff's claims - with one exception - on the ground of failure to exhaust timely her administrative remedies. It is well-settled that the timeliness requirement at issue herein is not jurisdictional; the filing deadline is subject to waiver, estoppel, and equitable tolling. *See Briones v. Runyon*, 101 F.3d 287, 290 (2d Cir. 1996); *Bruce v. U.S. Dep't of Justice*, 314 F.3d 71, 74 (2d Cir. 2002). In *Bruce, supra*, the Second Circuit noted that an agency such as defendant waives a timeliness objection by making an express finding that the complaint was timely or failing to appeal an EEOC determination of timeliness. 314 F.3d at 74 (citing *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992); *cf. Briones*, 101 F.3d at 291 (holding that "a governmental agency defendant may not have a 'second bite at the apple' by arguing lack of timely filing in federal court after failing to challenge an EEOC determination that the complaint was timely filed"). Further, in *Bruce*, the court cited with approval the Seventh Circuit's holding in *Ester v. Principi*, 250 F.3d 1068, 1071-72 (7th Cir. 2001), that an agency waived its timeliness defense where it had issued a final decision on the merits of a discrimination complaint and did not raise a timeliness defense until the complainant filed suit in federal court. The Second Circuit deemed "good law" the Seventh Circuit's conclusion "that when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit." *Bruce*, 314 F.3d at 75 (quoting *Ester*, 250

F.3d at 1071-72).

In the present case, it is clear that the defendant agency fully investigated plaintiff's claims of employment discrimination, and thereafter participated in an evidentiary hearing conducted by EEOC. EEOC then rendered a determination on the merits of said claims. In the course of said administrative proceedings the only reference to the timeliness of plaintiff's claims appears in a footnote on the first page of EEOC's decision. Specifically, the ALJ noted that plaintiff asserted she was discriminated against on the basis of her age when she was hired as a part-time employee by SSA in 1995, while younger applicants were offered full-time positions. The ALJ deemed this allegation "untimely since she did not contact an EEO Counselor within the required 45 day time period." The Court presumes from the absence of evidence in the record that SSA made no additional arguments concerning timeliness of plaintiff's claims and/or that the ALJ considered the balance of claims raised in plaintiff's complaint timely. In either event, there is no indication that the issue of timeliness was raised in connection with any other aspect of plaintiff's claim or that either party appealed the determination of EEOC concerning the timeliness of the various instances of alleged unlawful discrimination at the heart of plaintiff's administrative complaint. Thus, with the exception of plaintiff's claim that she suffered age discrimination at the hands of SSA in 1995 when she was initially hired and offered a part-time position, defendant has waived the defense of untimeliness in

the present litigation.

In connection with plaintiff's age discrimination in hiring claim, the Court finds upon review of the entire record that EEOC's determination concerning the timeliness requirement was correct. *See Goldman v. Sears, Roebuck & Co.*, 607 F.2d 1014, 1017 (1st Cir. 1979) (EEOC's determination is a factor to be considered, but courts generally make an independent review of the timeliness of the agency filing). Here, plaintiff does not argue that equitable tolling, waiver or estoppel should be applied to her claim of age discrimination upon being hired in 1995. Moreover, there is no evidence in the record to suggest that any of these doctrines should be invoked to save plaintiff's 1995 claim of age discrimination in hiring. Based thereupon, the Court finds that plaintiff did not satisfy the timeliness requirement and thus failed to exhaust required administrative remedies in connection with alleged age discrimination that occurred upon her hire n 1995.

C. Age Discrimination in Denial of Promotion

Plaintiff alleges herein that during her employment with SSA younger employees in OHA were hired and/or promoted to legal assistant or decision writer positions while she was not despite being qualified for such a promotion. To state a *prima facie* claim for age discrimination, a plaintiff must establish that: 1) she is a member of a protected class (over age 40); 2) she adequately performed the duties of her position; 3) she suffered

an adverse employment action; and 4) the action occurred under circumstances giving rise to an inference of age discrimination. *See Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d Cir. 1999). In reviewing plaintiff's claim of discrimination under the ADEA, the Court must utilize the burden-shifting analysis set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The first step in the *McDonnell Douglas* formulation requires plaintiff to prove, by a preponderance of the evidence, a *prima facie* case of discrimination or unlawful retaliation by the employer. *See Bickerstaff v. Vassar College*, 196 F.3d 435, 446-47 (2d Cir. 1999). There is no dispute that plaintiff was over the age of 40 while employed at OHA. Thus, plaintiff meets the criteria of being a member of a protected class.

There is intense factual dispute between the parties concerning whether plaintiff was satisfactorily performing her job duties. Viewing the evidence in the light most favorable to plaintiff, the Court will assume, without deciding, that plaintiff's job performance was adequate. Insofar as establishing adverse employment action, plaintiff asserts that she was denied a promotion to full-time work and was never considered for a "decision writer" position with OHA. Defendant has proffered various explanations for why plaintiff did not advance in hours or grade level, including the fact that with the exception of applying for a hearing office clerk position in October 1995, approximately one month after she began her employment with OHA, she never applied for a specific promotion.

Instead, plaintiff states that "she told . . . [Carol Kaiser, ALJ Volhard and] anyone who would listen" at OHA that she wanted a full-time position with the agency "dozens of times" and assumed she would be considered for promotions based on her work performance and civil service promotion criteria. Since it is undisputed that plaintiff was not promoted during her tenure at OHA, the Court will assume she has established adverse employment action and that it occurred under circumstances giving rise to an inference of discrimination since younger individuals were hired and/or promoted while plaintiff was employed by defendant.

In the second step of the *McDonnell Douglas* process, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Bickerstaff*, 196 F.3d at 446. Defendant has satisfied this element of the test by arguing evidence in the record which shows a number of things concerning plaintiff's lack of promotion. First, as referenced above, defendant contends that with the exception of applying for one full-time position about a month after beginning work at OHA, plaintiff did not apply for any vacancies in the agency which arose during the course of her employment. Rather, plaintiff admits that she assumed since she told her OHA supervisors and others both at the time of her interview and during the course of working at the agency that she wished to be considered for full-time employment, she would be promoted non-competitively based on her previous years of government employment with OPM. Specifically,

plaintiff states that she could have been promoted non-competitively into a decision writer position based on her previous grade level and years of experience at OPM according to civil service requirements.

Defendant also asserts that plaintiff was not qualified for a decision writer position because she lacked both the educational background and/or experience for this job. To wit, defendant contends that OHA policies in effect at the time of plaintiff's employment required decision writers to be either attorneys or paralegal specialists with a working knowledge of disability matters and the ability to analyze, research and develop cases under the various federal disability law statutes. Insofar as plaintiff's application in October 1994 for a hearing office clerk position, defendant asserts that plaintiff did not complete the required computer training for this promotion.

The third part of the McDonnell Douglas process requires plaintiff to demonstrate that her age – and not the reason proffered by the defendant employer – was the true reason for the adverse employment decision. *Bickerstaff*, 196 F.3d at 446-47. "The plaintiff's opportunity to demonstrate that the employer's proffered reason was false [then] merges with [his] ultimate burden to persuade the trier of fact that [he] has been the victim of intentional discrimination (i.e., that an illegal discriminatory reason played a motivating role in the adverse employment decision)." *Id.* Thus, plaintiff is required to come forward with some evidence that her age was a motivating factor in

defendants' decision to terminate her employment. As referenced above, plaintiff's claim that OHA offered younger employees full-time positions while relegating she and another older OPM employee to part-time positions at the time of her hire were correctly deemed time-barred by EEOC. Regarding plaintiff's application for a full-time hearing office clerk position in October 1995, plaintiff has failed to show pretext in connection with defendant's explanation that she lacked the required computer training for this promotion. Although plaintiff asserts that Dino Franceschi was impatient with her, screamed at her, and failed to follow through with scheduled computer training sessions, importantly, she does not allege that Franceschi's actions were in any way motivated by age discrimination. Thus, there is no evidence in the record on which to base a conclusion that plaintiff was denied a promotion to a full-time hearing office clerk based on her age.

Insofar as plaintiff's claim that she was denied a promotion during her employment to a decision writer based on her age, the record likewise does not support this allegation. OHA criteria required decision writers to be either attorneys or paralegal specialists. During the time plaintiff was employed at OHA, two attorneys were hired as writers and only one employee, Linda Hendricks, was promoted to a paralegal specialist position. Ms. Hendricks was promoted on the first day of plaintiff's employment at OHA. She had worked at OHA for several years, was a legal assistant prior to her promotion and had extensive experience in preparation of files, drafting

of decisions and knowledge of federal disability programs.

Plaintiff has come forward with affidavits from two of her previous colleagues at OPM who opine that under OPM guidelines, OHA might have been authorized to promote her noncompetitively to a decision writer position or other higher grade level work in accordance with civil service requirements. In the first instance, the Court is not persuaded that affidavits concerning OPM guidelines and policies are even relevant to an inquiry regarding what a fellow agency, OHA did or did not do in the present case. However, even assuming the relevance or applicability of plaintiff's submissions on this issue, it is simply of no moment that OHA could have promoted plaintiff but chose not to.

To prove age discrimination, plaintiff must show that: 1) the non-discriminatory reasons given by the employer are false; and 2) that the real reasons were discriminatory. *Fisher v. Vassar College*, 114 F.3d 1332, 1335-1336 (2d Cir. 1995). Even assuming the truth of plaintiff's assertion that OHA could have automatically promoted her non-competitively, there is simply no evidence in the record which suggests, much less proves, that OHA denied a promotion to plaintiff based on her age, particularly since plaintiff admits that she never even applied for such a position during her employment with OHA. The law is well-settled that an employee alleging unlawful discrimination must show that an employer's proffered reasons for an adverse employment action are a pretext for discrimination. *Fisher*, 114 F.3d at 1339. "[A]

reason cannot be proved to be a 'pretext **for discrimination**' unless it is shown **both** that the reason was false **and** that discrimination was the real reason." *Id.* (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (emphasis in original). The Court finds that no rational trier of fact could look at the evidence in the case and conclude that age discrimination was the real reason or even motivating factor in OHA's decision not to promote plaintiff spontaneously and noncompetitively to a decision writer.

D. Hostile Work Environment

A hostile work environment claim requires a showing that the workplace was so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered so as to create an abusive working environment. *See Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997). Whether a work environment is sufficiently abusive to be actionable under Title VII depends on all of the circumstances of a given situation, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). As a general rule, incidents "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Perry*, 115 F.3d at 149 (citation and

internal quotation marks omitted). Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness. *See Brennan v. Metropolitan Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2d Cir. 1999); *Quinn v. Greentree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998).

Plaintiff asserts that she was harassed and abused by employees and her supervisors to the point that she became ill and developed shingles. Even crediting her claim that it took Carol Kaiser a year or more to remove the "vulgar" postcard from her line of vision it is not possible for the Court to conclude that this action was evidence of defendant's hostility to plaintiff's religion. Plaintiff also states that she was assigned more telephone duties than other employees and was prohibited from changing her day off from Thursday to Friday. It is unclear whether she cites these as examples of the hostility of her work environment or as evidence of disparate treatment. In any event, the Court finds that the record does not support her claim that being assigned to extra phone duty or having to pick a day other than Friday as her day off was because of or related to her age or religion. The Court notes that record does support plaintiff's claim that her work environment was stressful and unpleasant. However, even crediting plaintiff's allegations that fellow employees and supervisors were constantly "screaming" and "yelling" at her, there is no indication that this alleged abuse was based on plaintiff's age or religion. As recently stated by a fellow district judge in a similar case "neither Title VII nor the ADEA prohibit employment decisions

based on personal animosity or a poor working relationship. . . . Neither statute is "a civility code nor a statute making actionable the ordinary tribulations of the workplace.'" *Westerman v. General Nutrition Corp.*, 2007 WL 320796, *5 (W.D. Pa. January 30, 2007) (citing *Gharzouzi v. Northwestern Human Servs. of Pa.*, 225 F.Supp.2d 514, 534 (E.D. Pa. 2002) and *Davis v. City of Lake Park, Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001)).

Viewing the record in the light most favorable to plaintiff, the Court does not find that plaintiff's alleged harassment by fellow employees and/or supervisors meets the standard required for establishing age or religious discrimination under the ADEA or Title VII. There is absolutely no evidence in the record which suggests any of the yelling, screaming, humiliation, joking or abuse allegedly heaped on plaintiff by employees at OHA had anything at all do with her age. Furthermore, there is likewise no evidence which demonstrates that plaintiff was targeted for abuse based on her religion. As noted by defendant, there were several other employees at OHA who were Roman Catholics and there is no indication that plaintiff or any other OHA employee was treated differently based on religion. The record makes clear that some employees felt uncomfortable around plaintiff given the devout nature of her religious beliefs and may have thought that her "prudish" ways were humorous or even silly. And though sporadic jokes about plaintiff being "holy" or a "goody goody" might have been made in her presence, these incidents were not severe or pervasive enough to suggest

hostility to plaintiff's **religion** - as opposed to her piety, hostility to which is not actionable. Though plaintiff has succeeded in demonstrating that she felt unhappy, unappreciated and ostracized at work, she has not established that any of this alleged poor treatment of her was based on her age or religion.

E. Constructive Discharge

A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. *See Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). The working conditions must be so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *See id.* Again, viewing the evidence in the light most favorable to plaintiff, the Court finds that no reasonable person would have felt compelled to resign based on the allegations of alleged hostility or discrimination claimed by plaintiff herein. In any event, plaintiff has not adduced herein the type of evidence required to show a deliberate attempt on the part of defendant to "create intolerable workplace conditions" for plaintiff. *See Whidbee v. Gazarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000). Based thereupon, plaintiff's constructive discharge claim cannot stand.

## IV. CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by defendant for summary judgment is GRANTED; and it is further

ORDERED that plaintiff's amended complaint is hereby dismissed in it entirety.

IT IS SO ORDERED.

Dated: September 27, 2007
Syracuse, New York

Norman A. Mordue
Chief United States District Court Judge

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE

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Ann DeSalvo,
Complainant,

v.

William A. Halter, Acting Commissioner
Social Security Administration,
Agency.

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EEOC Hearing No. 160-99-8061X
Agency File No. 97-0562

BEFORE: Kevin J. Berry
Administrative Judge

DECISION

Ann DeSalvo ("Complainant"), alleges discrimination on the basis of religion (Roman Catholic), and age (DOB 8/12/41) when in reaction to harassment she was forced to resign on May 13, 1997; from late 1995 until May 30, 1997 she was not permitted to work overtime and credit hours; in late April or early May 1997 she was not selected to participate on any promotion panels anywhere in the country; in May 1997, the Hearing Office Manager criticized her in

front of her co-workers; in May 1997, she was assigned a larger workload than the other clerks; in May 1997 she was not considered when the office hired persons for the Decision Writer position; and on May 13, 1997, the Hearing Office Manager changed her day off to accommodate a new employee.[1] See, Report of Investigation ("ROI"), Formal EEO Complaint filed on August 27, 1997.

The Agency complied with all procedural and regulatory perquisites, after which the Complainant requested a hearing before an EEOC Administrative Judge. A hearing was held on November 8 and 9, 2000. The witnesses testifying at hearing included Louise Ann Galvin, Elaine Haines, Susan Marie Vaeth, Joseph Medicis, Alfred Tyminski, Sharon Lee Ann Little, Sandy Restani, Mark Wasileski, Dino Franchesi, Carol Kasier, Yvonne Kent, David Neumann, Karen Ann Paradiso, Joachim Volhard and the Complainant.[2]

EOC jurisdiction to decide this case is predicated on Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16 ("Title VII") and the Age Discrimination in Employment Act of 1967 (ADEA),

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[1] The Complainant alleged that she was discriminated against based on her age when she was not hired as a full time employee in 1995. I find that this allegation is untimely since she did not contact an EEO Counselor within the required 45 day time period. See "HT" at 6.

[2] The Complainant raised an allegation at the Hearing that some witnesses were subjected to intimidation by Judge Volhard and Ms. Kaiser. The Administrative Judge questioned these witnesses and no one corroborated the Complainant's allegation. See "HT" at 104, 124.

as amended, 29 U.S.C. 621 *et. seq.* Regulations authorizing hearing procedures appear at 29 C.F.R. § 1614.

The burden of proof in discrimination cases is generally allocated according to the standard established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The ADEA bans age discrimination against federal employees, and states in part:

> (A) All personnel actions affecting employees or applicants for employment who are at least forty years of age...shall be made free from any discrimination based on age... [29 U.S.C. 633(a)].

Although *McDonnell Douglas Corp. v. Green,* supra. was brought under Title VII, a number of courts have found it appropriate to apply its principles by analogy to ADEA cases. *Sutton* v. *Atlantic Richfield Co.,* 646 F. d. 497 (9th Cir. 1981); *Loeb* v. *Textron, Inc.* 600 F. d. 1003 (1st Cir. 1979). This case set forth a three-tier test for determining whether there has been discrimination. The Complainant has the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not such actions were based on discriminatory criteria. Once a *prima facie* case has been established, the burden of going forward shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. If the employer articulates a legitimate reason, the burden is then on the Complainant to prove, by a preponderance of the

evidence, that the legitimate reason offered by the employer was not its true reason, but a mere pretext for discrimination. See *St. Mary's Honor Center v. Hicks*, 125 L.Ed. 2d 407 (1993).

For the Complainant to prevail, the evidence must initially establish, at least, that there is some substance to the charge. The Complainant must establish a *prima facie* case of disparate treatment; that is, a body of evidence such that, if not rebutted, a finder-of-fact could conclude that unlawful discrimination occurred. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Construction Corp. v. Waters,* 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). This requires the Complainant to prove that "similarly situated" employee(s) outside of her protected group(s) were treated more favorably under similar circumstances. Persons are "similarly situated" when all the relevant aspects of the Complainant's employment (i.e., same supervisor, tour, work section, installation, grade, etc.) and the comparable employee are nearly identical. *Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir. 1985); *Murray v. Thistledown Racing Club Inc.*, 770 F.2d 63, 68 (6th Cir. 1985); *Nix v. Illinois Central Gulf RR,* 665 F. Supp. 1308, 1333 (W.D. Tenn 1987).

In order for harassment to be considered conduct in violation of the statute, the conduct need not seriously affect and employee's psychological well being or lead the employee to suffer psychological injury. Rather, as stated in *Meritor Savings Bank v.*

*Vinson,* 477 U.S. 57 (1986), the applicable standard provides that the law is violated when the work place is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatory hostile or abusive environment. This standard requires an objectively hostile or abusive environment, one that a reasonable person would find hostile or abusive, as well as the victim's subjective perception that the environment is abusive. See *Harris* v. *Forklift Systems, Inc.,* 114 S. Ct. 367, 371 (1993). Moreover, unless the conduct is very severe, a single incident or group of isolated incidents will not be regarded as discriminatory.

The following findings and conclusions of facts and law are made after a through review and evaluation of the record, including the observation of the witnesses' demeanor during the course of the hearing, which enabled me to weigh the credibility of their testimony and corroborate same with the adduced evidence of record. *Kevin McGivern v. Marvin T. Runyon, Jr., United States Postal Service,* EEOC Request No. 05930481 (March 17, 1994) (Administrative Judge's credibility rulings are given great deference unless there is substantial evidence in the record to support a contrary assessment).

I find that the Complainant has established a *prima facie* case of religion and age discrimination. It is now the burden of the Agency to articulate a legitimate non-discriminatory reason for the challenged actions. I find that the Agency has met that burden. The Complainant was employed by the

Office of Personnel Management (OPM) as a personnel staffing specialist GS-11 until September 16, 1995 when she was subjected to a Reduction In Force (RIF). See "ROI" Exhibit 6, 16. Based on the impending RIF and the fact that she did not want a break in her Federal service, the Complainant applied for and was hired as a part-time Office Automation Clerk, GS-4, at the Social security Administration, by Carol Kaiser, Hearings Office Manager, and Joachim Volhard, Acting Hearing Office Chief Administrative Law Judge, effective September 17, 1995. See "ROI" Exhibit 7, 16, Hearing Transcript, hereinafter "HT", at 202, 208, 422.

The Complainant alleges that she was denied the opportunity to work overtime and earn credit hours. The record and testimony shows that the Complainant was one of the first part-time employees hired by Ms. Kaiser. Ms. Kaiser testified that she was at first unaware of the restrictions on overtime for part-timers when she allowed the Complainant to work overtime. See "HT" at 223-224. When Ms. Kaiser was informed by the Regional Chief Judge's Office that this was not allowed, due to the fact that part timers working overtime could result in their positions being converted to full time equivalents which would have an adverse affect on the approve staffing levels, the Complainant and all other part-time employees were restricted in their ability to work overtime. See "HT" at 223-224, Exhibit 7, 10. Concerning the denial of credit hours the Complainant was denied the opportunity to work

credit hours because she was abusing this privilege by utilizing the credit hours worked to devise an alternate work scheduled which imposed a burden on the office. Thus, the Complainant was no longer allowed to work credit hours. See "HT" at 225, 229-230, 383-384. No evidence or testimony showed that other similarly situated employees utilized credit hours in such a fashion.

In reference to the Complainant's allegation that she was denied a decision writer position or paralegal position the record shows that there were no vacancies for a paralegal in the Syracuse office during her period of employment with the Agency. Further, while there were decision writer positions filled during the relevant period one of the requirements for the position was to be an attorney. See "HT" at 346-348, 242-244, 430-431. The Complainant was not an attorney thus she was not qualified for the vacancies in question. Concerning the Complainant's allegation that she was not selected for a joint Agency-Union promotion panel the evidence shows since the Complainant was a bargaining unit employee her selection or non-selection rested with the Union and not with management. See "HT" at 236, 387-388, "ROI" Exhibit 7, 10. The Complainant has not identified any similarly situated employee who was treated more favorably when it came to selection to promotion panels.

The evidence does not support the Complainant's contention that she was discriminated against when

scheduling changes were made in May, 1997,. that she was assigned a larger workload than other clerks, that she was criticized in front of other co-workers or that she was forced to resign in May 1997. The record and testimony shows that the Complainant, who formerly had Fridays off had switched her day off to Thursday in April 1997 to accommodate her personal needs. See "HT" at 260-261, 397 "ROI" Exhibit 7B. In the Spring of 1997 the Hearing Office's receptionist retired and immediately Ms. Kaiser began the process of hiring a replacement. See "HT" at 246, 259-260, 393, "ROI" Exhibit 7. In the interim, Agency staff was assigned to cover the receptionist duties, including the Complainant who was assigned this duty more than other staff since she was the most available employee since she had failed to learn other duties. See "HT" at 250-251, 392, "ROI" Exhibit 7, 10, 20. Complainant was upset about the coverage schedule and on April 29, 1997 wrote "I quit" on a piece of paper and placed it in Ms. Kaiser's in basket. Subsequently, on May 9, 1997 the Complainant changed her mind and was permitted to withdraw her resignation. See "HT" at 251-253, 259, 260, "ROI" Exhibit 19, 7, 8. Between the period that the Complainant resigned on April 29, 1997 and her withdrawal of said resignation the job of receptionist was filled with the understanding that the receptionist's day off would be Friday. When the Complainant and Ms. Kaiser met on Ms. Kaiser's return to the office on May 13, 1997 it is apparent that Ms. Kaiser was surprised that the Complainant was in the office since she had quit approximately

two weeks before. Ms. Kaiser's surprise manifested itself in her questioning the Complainant about her return and what was expected from her in performing her job. See "HT" at 254, 398-399. It was at this time that the Complainant asked to have her day off changed to Friday. Ms. Kasier testified that she would have been embarrassed to have renege on a day off which had already been agreed to with a new employee. Ms. Kaiser informed the Complainant that, if and when Fridays again became available, then she could again have that day off. See "HT" at 261. The Complainant resigned again later the same day. See "ROI" Exhibit 7, 18.

The harassment cited by the Complainant in her complaint and during her testimony, I find do not rise to the level of unlawful harassment as delineated under law. The comment allegedly made by Ms. Kasier that the Complainant was a "goody-goody" nor the occasional profanity use by Ms. Kaiser and others in the workplace does not give rise to unlawful harassment which must be sufficiently pervasive or severe as to alter the conditions of employment and create an abusive working environment. In fact, the testimony of Ms. Vaeth suggests that employees were on their guard when it came to making comments in front of the Complainant because of her outwardly religious beliefs and their concern that the Complainant may find their comments offensive. See "HT" at 139, 143. The Complainant conceded that no one ever made fun of her religion in her presence. See Exhibit 6. Most witnesses testified that they neither heard or

observed any actions which they would characterize as harassment based on age or religion. See "HT" at 93-94, 155-156, 194-196, 284, 289-290, 313, 314, 317, 345-346, 375, 384-385, 433-434. Concerning the "objectionable" postcard which the Complainant requested be removed the testimony showed that it was immediately taken down. See "ROI" Exhibit 6, "HT" at 97, 240-241. It is clear the testimony of the Complainant that she was unhappy with her part-time position and her grade level, which was seven grades lower than the position she previously held when she was RIFed from OPM. See "HT" at 14. In fact, in the testimony of Dino Franceschi, Computer Specialist, the Complainant acted as though many of her duties were beneath her and that she was upset by being RIFed from OPM. See "HT" at 312-313. Based on the testimony of Mr. Franceschi and the overall record I find that the Complainant's inability or resistance to learning new procedures lead to her difficulties with Mr. Franceschi and Ms. Sullivan when they attempted to train her. See "HT" at 301, 303, 322, 325-326. Looking at the record as a whole I do not find sufficient evidence to support the Complainant's contention that she was unlawfully harassed and thus forced to resign.

## CONCLUSION

Viewing all the evidence in the light most favorable to the Complainant, I find that she has failed to meet her burden of proving religion or age discrimination.

NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(b), 109(g) or 109(I). EEOC regulations require the Agency to take final action on the complaint by issuing a final order within 40 calendar days of receipt of the hearing file and this decision. The Agency's final order shall notify the complainant whether or not the Agency will fully implement this decision, and shall contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. A copy of the Final Order shall also be provided to the Administrative Judge.

**With the exception detailed in the next paragraph, complainant may not file an appeal to the Commission directly from this decision**. Rather complainant may appeal to the Commission within 30 calendar days of receipt of the Agency's final order concerning its implementation of this decision. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. §1614.403, and append a copy of the appeal to the final order. A copy of EEOC form 573 must be attached to the final order.

Complainant may only appeal directly from this decision in the event that the Agency has **not** issued

its final order within 40 calendar days of its receipt of the hearing file and this decision. In this event, the complainant should append a copy of the Administrative Judge's decision to the appeal. The complainant should furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the opposing party.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848, Washington, D.C. 20036
Fax No. (202) 663-7022

Facsimile transmissions over 10 pages will not be accepted.

For further guidance regarding appeals, the parties may consult 29 C.F.R. §1614.401 et seq. and Chapter 10 of the Commission's Management Directive-110. These documents are available on the EEOC's website at EEOC.GOV.

## COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. §1614.504, an Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within 30 calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within 30 calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least 35 calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within 30 calendar days of receiving the notice of appeal.

2/23/01
Date

KEVIN J. BERRY
Administrative Judge

## CERTIFICATE OF SERVICE

For timeliness purposes, it will be presumed that this Order was received within five (5) calendar days after it was mailed. I hereby certify that the foregoing Order was sent by me by first class mail to:

Ann DeSalvo
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Baldwinsville, NY 13027-9402

Barbara Hampton
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P.O. Box 313135
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2/14/01
Date

Gem Jewsbury

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of April, two thousand and nine,

Before: Hon. Rosemary S. Pooler,
Hon. Debra Ann Livingston,
Circuit Judges,
Hon. Jed S. Rakoff,*
District Judge.

**ORDER**
Docket Number: 07-4403-cv

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ANN M. DESALVO,
Plaintiff-Appellant,

V.

JOACHIN J. VOLHARD, CAROL KAISER, KEVIN J. BERRY, DAVID NEUMAN, MARY JOAN

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* The Honorable Jed S. Rakoff, United States Judge of the United States District Court for the Southern District of New York, sitting by designation.

MALESKI, JEAN SULLIVAN REED,
Defendants-Appellees,

LOUISE GALVIN,
Defedant,
ROXANA PONTIUS, SOCIAL SECURITY ADMINISTRATION, JOANNE B. BARNHARD, COMMISSIONER, JOSEPH G. MEDICIS, CAROLYN BURIAN, SSA EEO COUNSEL FOR THE SOCIAL SECURITY ADMINISTRATION, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CARLTON M. HADDEN, DIRECTOR,
Defendants-Appellees.

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Appellant pro se, ANN M. DESALVO, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: Frank Perez
Frank Perez, Deputy Clerk